



Rulemaking 101

DISCLAIMER: All statements made in this seminar are solely the opinion of the Council's staff.

CHRIS KLEMINICH

LEAD STAFF ATTORNEY

GOVERNOR'S REGULATORY REVIEW COUNCIL

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Seminar Structure

PART ONE:

- ▶ **Discussion – Realities of Rulemaking in 2017**
- ▶ **Introduction to Rulemaking**

PART TWO:

- ▶ **Regular Rulemaking Procedure**
- ▶ **Discussion – Navigating the Rulemaking Process**
- ▶ **GRRC's changing dynamics**

QUESTIONS

DISCUSSION

Realities of Rulemaking in 2017

THE “PLAYERS”


- ▶ **Agencies** - implement rules that fill gaps in broad policy, except in instances where detail is provided in statute
- ▶ **The Public** - any “person,” including individuals and organizations
 - ▶ Rules may not be approved unless an agency adequately addresses comments from the public.
- ▶ **Arizona Legislature** – sets broad policy
- ▶ **Governor’s Office** – rulemaking moratorium

THE “PLAYERS”

- ▶ Secretary of State’s Office – the “keeper of the rules”
- ▶ GRRC – final approval authority over most rules
- ▶ Courts – decisions have dealt with:
 - ▶ Agency policies not adopted in rule
 - ▶ Rules inconsistent with statute
 - ▶ Rules invalid because an agency did not follow the A.P.A.

THE LAWS OF RULEMAKING


- ▶ Your agency's organic statutes
 - ▶ Create authority, responsibilities, and program direction
- ▶ Administrative Procedure Act (A.P.A.): A.R.S. Title 41, Chapter 6
 - ▶ Procedures to make a rule - Article 3
 - ▶ GRRC authority - A.R.S. § 41-1052
- ▶ Secretary of State rules: A.A.C. Title 1, Chapter 1
 - ▶ Standards for publication
- ▶ Council rules: A.A.C. Title 1, Chapter 6
 - ▶ Rule review procedures
- ▶ Also: Federal and AZ Constitutions, Generally Applicable Federal Laws



Throughout a rulemaking,
make sure you are using
the most recent version of
all laws.

TYPES OF RULEMAKING

- ▶ Regular – See generally A.R.S. §§ 41-1021 through 41-1024, and 41-1052
- ▶ Exempt
 - ▶ Under A.R.S. § 41-1057 - See generally A.R.S. §§ 41-1021 through 41-1024, and 41-1044
 - ▶ Under the agency's organic statutes or session law or A.R.S. § 41-1005
- ▶ Emergency – See generally A.R.S. §§ 41-1026 and 41-1044
- ▶ Expedited – See generally A.R.S. §§ 41-1027 and 41-1053



Before beginning any
rulemaking activities, an
agency must receive an
exemption from the
rulemaking moratorium from
the Governor's Office.

Exempt Rulemaking

- ▶ How broad is your exemption?
 - ▶ A.R.S. 41-1005 exemptions: The entire APA
 - ▶ A.R.S. 41-1057 exemptions: Article 5 (GRRC)
 - ▶ Statutory or Session Law exemptions: It depends!
- ▶ Fees made under an exemption:
 - ▶ A.R.S. 41-1008(E): A fee that is established or increased by exempt rulemaking is effective for two years unless an extension is granted by the Council.
 - ▶ A.R.S. 41-1008(F): After two years, an agency shall not charge or receive the fee unless it has completed a regular rulemaking to establish or increase the fee.

Exempt Rulemaking

► 2016 LEGISLATION – Established A.R.S. 41-1095:

For an agency that the legislature has granted a one-time rulemaking exemption, within one year after a rule has been adopted the agency shall review the rule adopted under the rulemaking exemption to determine whether any rule adopted under the rulemaking exemption should be amended or repealed.

Emergency Rulemaking

- ▶ If an agency makes a finding that a rule is necessary as an emergency measure, the rule may be made, amended, or repealed:
 - ▶ Without the notice prescribed by sections 41-1021 and 41-1022 and prior review by the Council,
 - ▶ If the rule is first approved by the AG and is filed with the SOS.
- ▶ Emergency rules are valid for 180 days after filing with the SOS and may be renewed for 180 additional days if six conditions are met in A.R.S. 41-1026(D).

Expedited Rulemaking

- ▶ A.R.S. 41-1027 and 41-1053
- ▶ A little-used process since its creation in 2012
- ▶ An agency may conduct expedited rulemaking if the rulemaking does not:
 - ▶ Increase the cost of regulatory compliance,
 - ▶ Increase a fee, or
 - ▶ Reduce procedural rights of persons regulated

Expedited Rulemaking

- ▶ Generally speaking, an agency may conduct expedited rulemaking if the rulemaking does one or more of the following:
 - ▶ Amends or repeals obsolete rules,
 - ▶ Amends or repeals unconstitutional rules,
 - ▶ Makes, amends, or repeals rules repeating verbatim existing statutory authority.
 - ▶ Makes, amends, or repeals rules relating only to internal governmental operations that are not subject to violation by a person.
 - ▶ Corrects typographical errors, makes address or name changes, or clarifies language of a rule without changing its effect.
 - ▶ Adopts or incorporates by reference, without material change, federal or state statutes or rules.
 - ▶ Reduces or consolidates steps, procedures, or processes in the rules.
 - ▶ Amends or repeals rules that are outdated, redundant, or otherwise no longer necessary for the operation of state government.

Expedited Rulemaking

Pending legislation (SB 1055):

- ▶ Allows the use of expedited rulemaking to implement actions proposed in a 5YRR if:
 - ▶ There are no material changes to the proposal, and
 - ▶ The expedited rulemaking is filed within 180 days of Council's approval of the report.
- ▶ Grants an automatic immediate effective date to any proposed expedited rulemaking, instead of a delay of 30 days after publication. (Saves 7-8 weeks)
- ▶ Begins the 30 day public comment as soon as the agency posts notice of the proposed expedited rules on its website, rather than waiting for SOS publication. (Saves 3 weeks)
- ▶ Removes notification requirements for proposed expedited rules to the President and the Speaker. Notice goes to Legislative Council instead, mirroring regular rulemaking.
- ▶ Removes requirement for certain categories of expedited rules to have approval of the Governor prior to proceeding. (Significant only if a moratorium is not in place)

BREAK

Regular Rulemaking Procedure

1

Docket Opening

- A.R.S. § 41-1021 describes requirements
- Publish a Notice of Docket Opening in the Administrative Register by filing with the SOS
- A docket automatically terminates one year after publication if the Notice of Proposed Rulemaking is not filed.

Stakeholder Input

- A.R.S. § 41-1023(A)
- It is optional, but highly recommended, to informally meet with stakeholders for input.
- Stakeholders can include program staff, other agencies, the regulated public, the protected public, advocacy groups, agency AAG, etc.

A.R.S. 41-1023(A) and (B)

- ▶ A. After providing notice of docket openings, an agency may meet informally with any interested party for the purpose of discussing the proposed rule making action. The agency may solicit comments, suggested language or other input on the proposed rule. The agency may publish notice of these meetings in the register.
- ▶ B. For at least thirty days after publication of the notice of the proposed rule making, an agency shall afford persons the opportunity to submit in writing statements, arguments, data and views on the proposed rule, with or without the opportunity to present them orally.

Regular Rulemaking Procedure

2

Draft Rules

- If amending an existing rule, download the rule from the SOS website.
- If the rule was recently amended, use the text of the final rules in the Administrative Register

Draft EIS

- Prepare preliminary economic, small business and consumer impact statement.
- Consult A.R.S. §§ 41-1035 and 41-1055
- Attend EIS 101 Seminar!

Regular Rulemaking Procedure


3

Oral Proceeding Decision

- Decide whether an oral proceeding is necessary per A.R.S. § 41-1023(C)-(F).
- An oral proceeding may be held no sooner than 30 days after Notice of Proposed Rulemaking is published.
- If anyone requests one, an agency must hold one.

Notice of Proposed Rulemaking

- A.R.S. §§ 41-1001(16)(a) and (b) and 41-1022.
- Complete form for Notice of Proposed Rulemaking, which includes the preamble, table of contents and text of rule.
- File with SOS.



Oral proceedings must be conducted in a manner that allows discussion and opportunity for questions.

If not included in the Notice of Proposed Rulemaking and a proceeding is requested, another notice will be required (delays the process by about 2 months)

Regular Rulemaking Procedure

4

Interested Persons

- A.R.S. § 41-1022(C): When an agency files a notice of the proposed rulemaking with the SOS, the agency shall notify each person who has made a timely request for notification of the proposed rulemaking and to each person who has requested notification of all proposed rulemakings.

Rulemaking Record

- Maintain information required in A.R.S. § 41-1029.

Public Comments

- Accept written comments for at least 30 days
- Respond (if necessary/appropriate) to comments
- Hold oral proceeding (recommended)

Regular Rulemaking Procedure

5

Close of Record

- Date the agency chooses as deadline for public comment (it is recommended that this date be included in the Notice of Proposed Rulemaking)

Rule Revision

- Based on public comments or internal review, decide whether rules will be revised.
- Assess if revisions are substantial as defined in A.R.S. § 41-1025.
- If a rule change is substantial, file a Notice of Supplemental (New) Proposed Rulemaking and allow 30 additional days for comment.

A.R.S. 41-1025

- ▶ A. An agency may not submit a rule to the Council that is substantially different from the proposed rule contained in the notice of proposed rulemaking...
- ▶ B. In determining whether a rule is substantially different from the published proposed rule on which it is required to be based, all of the following must be considered:
 - ▶ 1. The extent to which all persons affected by the rule should have understood that the published proposed rule would affect their interests.
 - ▶ 2. The extent to which the subject matter of the rule or the issues determined by that rule are different from the subject matter or issues involved in the published proposed rule.
 - ▶ 3. The extent to which the effects of the rule differ from the effects of the published proposed rule if it had been made instead.

Regular Rulemaking Procedure

6

Submission

- Rule package includes: final economic, small business, and consumer impact statement and Notice of Final Rulemaking (NFR)
- NFR preamble includes effective date, changes, and responses to comments
- Submit to GRRC and to AROC

GRRC Staff Review

- Council staff reviews the submission, and may have comments and/or questions.
- Council staff has the authority to suggest revisions.

Regular Rulemaking Procedure

7

Council Review

- Agency attends Council study session and regular meeting
- Council may ask questions of an agency.
- Council approves or returns the rules in whole or in part

Rule Effective

- Agency files approved rules with SOS
- Rule becomes effective 60 days after filing with SOS unless agency requests otherwise and meets the requirements in A.R.S. § 41-1032(A).

A.R.S. 41-1032

- ▶ A. A rule may only be effective immediately for any of the following reasons:
 - ▶ 1. To preserve the public peace, health or safety.
 - ▶ 2. To avoid a violation of federal law or regulation or state law, if the need for an immediate effective date is not created due to the agency's delay or inaction.
 - ▶ 3. To comply with deadlines in amendments to an agency's governing statute or federal programs, if the need for an immediate effective date is not created due to the agency's delay or inaction.
 - ▶ 4. To provide a benefit to the public and a penalty is not associated with a violation of the rule.
 - ▶ 5. To adopt a rule that is less stringent than the rule that is currently in effect and that does not have an impact on the public health, safety, welfare or environment, or that does not affect the public involvement and public participation process.
- ▶ B. An agency may specify an effective date more than sixty days after filing of the rule if:
 - ▶ The agency determines that good cause exists, and
 - ▶ The public interest will not be harmed.

DISCUSSION

Navigating the Rulemaking Process

GRRC's CHANGING DYNAMICS

A.R.S. 41-1052

- ▶ D. The council shall not approve the rule unless:
 - ▶ 1. The economic, small business and consumer impact statement contains information from the state, data and analysis prescribed by this article.
 - ▶ 2. The economic, small business and consumer impact statement is generally accurate.
 - ▶ 3. The probable benefits of the rule outweigh within this state the probable costs of the rule and the agency has demonstrated that it has selected the alternative that imposes the least burden and costs to persons regulated by the rule, including paperwork and other compliance costs, necessary to achieve the underlying regulatory objective.
 - ▶ 4. The rule is written in a manner that is clear, concise and understandable to the general public.
 - ▶ 5. The rule is not illegal, inconsistent with legislative intent or beyond the agency's statutory authority.

GRRC's CHANGING DYNAMICS

A.R.S. 41-1052

- ▶ D. The council shall not approve the rule unless:
 - ▶ 6. The agency adequately addressed, in writing, the comments on the proposed rule and any supplemental proposals.
 - ▶ 7. The rule is not a substantial change, considered as a whole, from the proposed rule and any supplemental notices.
 - ▶ 8. The preamble discloses a reference to any study relevant to the rule that the agency reviewed and either did or did not rely on in the agency's evaluation of or justification for the rule.
 - ▶ 9. The rule is not more stringent than a corresponding federal law unless there is statutory authority to exceed the requirements of that federal law.
 - ▶ 10. If a rule requires a permit, the permitting requirement complies with section 41-1037.

GRRC's CHANGING DYNAMICS

A.R.S. 41-1056

- ▶ A. At least once every five years, each agency shall review all of its rules, including rules made pursuant to an exemption from this chapter or any part of this chapter, to determine whether any rule should be amended or repealed.
- ▶ C. The council shall schedule the periodic review of each agency's rules and shall approve or return, in whole or in part, the agency's report on its review. The council may grant an agency an extension from filing an agency's report....The council shall not approve a report unless the report complies with subsection A of this section.
- ▶ D. The council may review rules outside of the five-year review process if requested by at least four council members.

GRRC's CHANGING DYNAMICS

A.R.S. 41-1056

- ▶ E. The council may require the agency to propose an amendment or repeal of the rule by a date no earlier than six months after the date of the meeting at which the council considers the agency's report on its rule if the council determines the agency's analysis under subsection A of this section demonstrates that the rule is materially flawed, including that the rule:
 - ▶ 1. Is not authorized by statute.
 - ▶ 2. Is inconsistent with other statutes, rules or agency enforcement policies and the inconsistency results in a significant burden on the regulated public.
 - ▶ 3. Imposes probable costs, including costs to the regulated person, that significantly exceed the probable benefits of the rule within this state.
 - ▶ 4. Is more stringent than a corresponding federal law and there is no statutory authority to exceed the requirements of federal law.

GRRC's CHANGING DYNAMICS

A.R.S. 41-1056

- ▶ E. The council may require the agency to propose an amendment or repeal of the rule by a date no earlier than six months after the date of the meeting at which the council considers the agency's report on its rule if the council determines the agency's analysis under subsection A of this section demonstrates that the rule is materially flawed, including that the rule:
 - ▶ 5. Is not clear, concise and understandable.
 - ▶ 6. Does not use general permits if required under section 41-1037.
 - ▶ 7. Does not impose the least burden to persons regulated by the rule as necessary to achieve the underlying regulatory objective of the rule.
 - ▶ 8. Does not rely on valid scientific or reliable principles and methods.